In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 359

JIMMIE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-16) is reported at 345 F. 2d 457.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1965. A petition for rehearing was denied on June 18, 1965. The petition for a writ of certiorari was filed on July 17, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The indictment charged, and the evidence showed, that petitioner was in the business of accepting wagers. The question is whether it was error for the court to refuse petitioner's request to charge on the differences between a banker, writer and pick-up man.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Ohio on an indictment charging that, from July to October 1963, he was engaged in the business of accepting wagers and willfully failed to register and pay the special tax required by law (see R. 2a). A second count, charging acceptance of wagers on behalf of another, was dismissed at the close of the government's case (R. 19a). Petitioner was sentenced to imprisonment for one year and fined $500 (R. 42a).

The evidence shows that a government agent observed petitioner regularly arrive at a shop with bags of numbered wagering slips which he would add up on an adding machine. Petitioner also received tickets and money from others. While at the shop, petitioner would himself accept bets from customers. The agent placed a bet with petitioner in September, 1963 (R. 6a-10a, 1b-7b). It was stipulated that petitioner had not registered and paid the tax.

The court denied petitioner's request to define "pick-up man" and "banker" (R. 22a) and to charge that, if there was no way of determining whether petitioner were a banker, pickup man or writer, he

would have to be acquitted under the indictment (R. 24a). The district court instructed the jury that the government had to prove beyond a reasonable doubt "that the defendant did knowingly and wilfully fail to register and pay the special tax after or at the time of being in the business of accepting wagers" (R. 34a). It read the statutory definition of wager and explained what was meant by being in business (R. 38a-39a).

In affirming the conviction, the court of appeals held that it was "not necessary to explain the argot of policy wagering. The government's evidence was directed to prove that appellant had accepted wagers. There was no evidence to support the theory that he was a member of one of several classes of gamblers or persons engaged in accepting wagers; and he was not entitled to an instruction defining such classes" (Pet. App. 14).

ARGUMENT

The court of appeals properly held that, when the district court charged the jury that it had to find (as the indictment charged) that petitioner engaged in the business of accepting wagers without having paid the special tax, it placed the issue in proper focus, and that it was unnecessary for the judge to define to the jury the status of banker, writer or pick-up man (terms explained in this Court's decision in *United States* v. *Calamaro*, 354 U.S. 351). The evidence showed unequivocally that petitioner engaged in the business of accepting wagers. That is all the statute

requires for liability for registration and payment of the special tax of $50. Section 4401 makes liable for the tax on the wagers themselves "[e]ach person who is engaged in the business of accepting wagers," and Sections 4411 and 4412 require registration and payment of the $50 tax by "each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

The essence of petitioner's argument is that only a "banker" accepts wagers under the statute (Pet. 9) and that a "writer", even though he must register and pay the tax, can be charged only as one who receives wagers on behalf of another. He relies upon two district court cases which do hold that only the banker is the "acceptor" of wagers and that, where defendant is charged with failure to register and pay the $50 tax, he cannot be convicted without proof as to whether he "accepted" the wagers on his own behalf or "received" them on behalf of another. *United States* v. *Pepe*, 198 F. Supp. 226 (D. Del.), and *United States* v. *Nicholas*, 224 F. Supp. 310 (W.D. Pa.). However, in *United States* v. *Manos*, 340 F.2d 534, the Court of Appeals for the Third Circuit recognized that the $50 tax must be paid by anyone who either accepts wagers on his own behalf or receives wagers on behalf of another, and upheld a conviction where the defendant was charged with being either.*

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* The decision in *Manos* indicates that the Third Circuit had affirmed the above cited *Pepe* decision reported at 198 F. Supp. 226 *per curiam* in 339 F.2d 264 (see Pet. 11). This is an error. The decision affirmed in 339 F.2d 264 was the denial of a motion for a new trial by the defendant Pepe after he had been convicted on a second trial. See 209 F. Supp. 592.

See also *United States* v. *Pasha*, 332 F.2d 193 (C.A. 7), to the same effect. Thus it makes no difference, in relation to the duty to register and pay the $50 tax, whether a person receives wagers for himself or for another; anyone who is in the business of taking wagers from a bettor must register and pay that tax. There is thus no reason why, on this aspect, the indictment should charge or the proof should show more than the controlling fact that the defendant was in the business of receiving wagers. In this Court's *Calamaro* decision, *supra*, holding that a "pick-up man" (*i.e.*, one who merely carries slips from the writer to the banker) was not liable to register and pay the tax because he was not a receiver of wagers, the Court made it clear that a bet is "accepted" when it is placed by the bettor. It said (354 U.S. at p. 355): "it is the making of a gambling contract, not the transportation of a piece of paper, to which the statute refers; and hence that, in such a case as this, it is the *writer* and not the pick-up man who is 'engaged in receiving wagers'" under the statute (emphasis supplied).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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